

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE JERON WINGO,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 268697

Wayne Circuit Court

LC No. 05-008765-01

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 10 to 18 years for the assault with intent to commit murder conviction and five to ten years for the assault with intent to do great bodily harm conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. Because there was no prosecutorial misconduct, defendant was not denied the effective assistance of counsel, and there was sufficient evidence to support his convictions, we affirm defendant's convictions, but remand for resentencing because defendant was denied his right to allocution at sentencing.

Defendant's convictions arise from an incident that began as a bar brawl at Shananigans in Hamtramck, and resulted in the shooting death of James McEntire and the nonfatal shooting of Shalla Shabazz and Todd Emanuel. Defendant was convicted of assault with intent to commit murder with respect to Shabazz, assault with intent to do great bodily harm less than murder with respect to Emanuel, and acquitted of involvement in McEntire's shooting death.

Defendant first argues that reversal is required because the prosecutor referred to evidence in his opening statement that was not introduced at trial. Because defendant did not object to the prosecutor's remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

In his opening statement, the prosecutor stated that the evidence would show that defendant obtained a gun and became involved in the incident because his sister was involved in a fight and had called for defendant's assistance. No evidence was presented at trial that

defendant's sister was hit, or that she called for defendant. Defendant argues that the prosecutor's unsupported statements in his opening argument established a motive for the shooting, which was outcome determinative.

When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Here, the investigator's report provided a reasonable basis for believing that evidence would be presented that defendant's sister was involved in a fight and had called for defendant's assistance. Thus, the prosecutor did not act in bad faith.

Further, defendant was tried in a bench trial and it is apparent from the trial court's findings that defendant was not prejudiced by the prosecutor's statements. "A judge, unlike a juror, possesses an understanding of the law, which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). The trial court in this matter explained its verdicts by referring to the eyewitness accounts of the shooting and made no findings regarding motive. Therefore, defendant has not established a plain error affecting his substantial rights.

We also reject defendant's related claim that defense counsel was ineffective for failing to object to the prosecutor's statements. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Although defendant argues that counsel should have objected because the "evidence" of defendant's motive was outcome determinative, no such evidence was presented. Defense counsel was aware that the prosecutor's opening statement was based only on anticipated evidence, and reasonably could conclude that the trial court would disregard any statements that were not supported by the evidence admitted at trial. As previously indicated, there is no indication that motive was a factor in the trial court's decision. Therefore, counsel was not ineffective for failing to object.

Defendant also argues that he was denied the effective assistance of counsel because of defense counsel's decision to call Laena Alexander who, contrary to what defense counsel anticipated, identified defendant as the shooter. Alexander also testified that she had previously identified defendant in a pretrial photo identification.

Decisions regarding calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

As defendant concedes, there were strategic reasons for calling Alexander as a witness because she provided a description of the shooter to the police that was inconsistent with defendant's description. Furthermore, it is apparent that defendant was not prejudiced by Alexander's testimony. Neither the prosecutor nor defense counsel was aware of Alexander's prior photo identification and, because of this discovery deficiency, the trial court agreed to

disregard any testimony about the photo identification. Additionally, it is apparent from the trial court's findings that its determination of defendant's identity as the shooter was based on other eyewitness testimony, particularly the testimony of Angelo Bridges, who was defendant's distant cousin, the testimony of the two assault victims, and the testimony of the bar owner James Clark. Therefore, defendant has not established the requisite prejudice necessary to prevail on a claim of ineffective assistance of counsel.

Defendant also argues, and the prosecutor agrees, that he was not afforded his right of allocution at sentencing and, therefore, is entitled to resentencing. At sentencing, the trial court must, on the record, give the defendant the opportunity to advise the court of any circumstances he believes the court should consider in imposing sentence. MCR 6.425(E)(1)(c). "Where the trial court fails to comply with this rule, resentencing is required." *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). The sentencing record reflects that the trial court heard from the mother of the deceased victim and then immediately proceeded to sentence defendant without affording defendant an opportunity to speak. Accordingly, resentencing is required.

In his standard 4 brief on appeal, defendant contends that there was insufficient evidence to convict him of assault with intent to commit murder. We disagree.

In evaluating the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of assault with intent to commit murder are, "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). "The intent to kill may be proven by inference from any facts in evidence." *Id* at 658. However, "[i]t is necessary to find an actual intent to kill for conviction of assault with intent to murder." *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992).

The evidence indicated that defendant looked at Shabazz through a car window, pointed a gun at him, and indicated that he recognized Shabazz as part of "the group of people." Shabazz held up his hand as defendant fired the gun and was shot in the hand. The rear passenger window of the Toyota was shattered and there was a bullet hole in the headrest of the passenger seat. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a conclusion beyond a reasonable doubt that defendant shot Shabazz with an intent to kill him.

Contrary to what defendant argues, the trial court's findings were not inconsistent. The court found that defendant's identity as the shooter of Shabazz and Emanuel was supported by the testimony of several witnesses, who were consistent in their accounts, whereas his identity as the shooter of McEntire was principally based on Oneka Knox's identification testimony, which was at variance with other witness accounts of defendant's appearance. The court recognized that the evidence showed that both Shabazz and McEntire were shot by the same gun, but concluded that it was possible that defendant shot Shabazz and then handed the gun to someone else, who shot McEntire. Accordingly, the trial court acquitted defendant in the shooting death

of McEntire. The trial court also justified its different findings regarding defendant's intent by explaining that the evidence showed that Shabazz appeared to have been deliberately targeted and that defendant fired toward Shabazz's head, thereby demonstrating an intent to kill, whereas Emanuel was shot during what appeared to be a random flurry of shots, which demonstrated only an intent to do great bodily harm less than murder. The trial court's findings reflect a rational view of the evidence and are not inconsistent.

Defendant also argues that trial counsel was ineffective for failing to request the appointment of an expert in eyewitness identifications. We disagree.

The decision whether to request an expert was a matter of trial strategy. *Rockey, supra* at 76. There were several eyewitnesses to the shooting incident. Counsel reasonably may have believed that an expert would have been ineffective considering the number of witnesses to the shooting, that one of the witnesses, Angelo Bridges, recognized defendant as a distant relative, and that defendant was being tried before the court, which was already familiar with potential weaknesses in witness identification. Thus, defendant has not overcome the presumption of sound trial strategy.

Furthermore, defendant has not demonstrated that the absence of an expert witness was prejudicial. Defense counsel challenged the witnesses' identification testimony at trial and was successful in obtaining an acquittal of the most serious murder charge involving James McEntire, despite evidence that the same gun was used in all the shootings and eyewitness testimony identifying defendant as the person who shot McEntire. Further, the trial court's verdicts with respect to the shootings of Shabazz and Emanuel were based not on the testimony of any single witness, but on the testimony of several witnesses, which the trial court found consistently pointed to defendant as the shooter. Defendant has not demonstrated a reasonable probability that the outcome of trial would have been different had an expert on eyewitness identification been appointed.

Finally, because defendant has not demonstrated multiple errors by defense counsel, reversal under a cumulative error theory is not warranted. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette